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No. 1458

In the
Supreme Court of the United States
OCTOBER TERM, 1969

BARBARA J. ABRAMSON,
Petitioner,

vs.

MYRA LEVINSON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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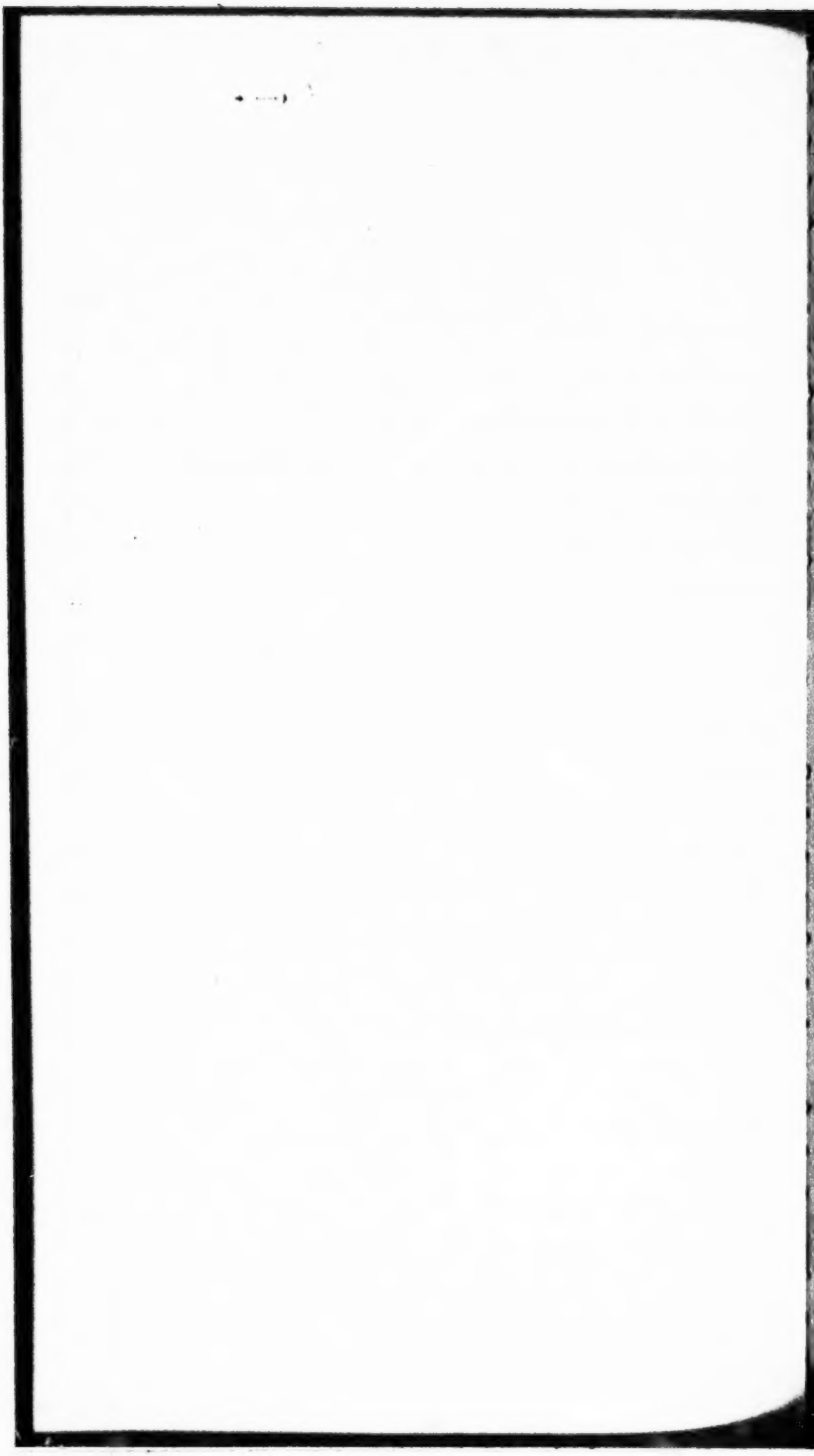

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Petitioner,

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To the Justices of the Supreme Court of the United States:

PROCEEDINGS BELOW

Two actions were filed, which included separate complaints, and answers thereto, counterclaim and an amended counterclaim, all of which actions were consolidated for trial, one brought by Myra Levinson Grusin (hereinafter referred to as Myra Grusin) against Barbara Abramson Figler (hereinafter referred to as Barbara Figler) and the other brought by Barbara Figler against Myra Grusin, both plaintiffs charging the other with negligence in the operation of their respective vehicles which collided with each other. Both plaintiffs were

seriously injured as a result of said collision. The jury rendered its verdict against Barbara Figler and in favor of Myra Grusin in the amount of $48,000.00, upon which the Court entered its judgment. Barbara Figler filed post-trial motions for judgment notwithstanding the verdict and for a new trial, which motions were denied and from which order and judgment she appealed to the Appellate Court of Illinois, First Judicial District. On April 25, 1969, the Appellate Court of Illinois, First Judicial District, affirmed the decision of the trial court. A petition for rehearing was filed by the plaintiff-appellant which was denied on July 25, 1969. Barbara Figler, plaintiff-appellant, filed her petition for an appeal as a matter of right and petition for leave to appeal in the Supreme Court of Illinois. Said petition was denied on November 24, 1969. Petitioner asks certiorari. Petitioner has exhausted her state remedies.

JURISDICTION

The jurisdiction of this Court to entertain the petition for a Writ of Certiorari is based on 28 USC Sec. 1257.

QUESTIONS PRESENTED FOR REVIEW

I.

Is it a violation of the constitutional right to a fair trial guaranteed by the due process clause of the Fourteenth Amendment and of the constitutional right to not be deprived of property without due process of law guaranteed by the Fifth Amendment to exclude the testimony of the expert witness called by Barbara Figler and for the lower courts to have not reversed the judgment of the trial court on the ground that the judgment of the trial court was against the manifest weight of the evidence.

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II.

Is it a violation of the constitutional right of trial by jury guaranteed in the seventh amendment for the trial judge to pass upon the value or weight to be given certain evidence, that being within the exclusive province of the jury.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED:

Constitutional Provisions

Sec. 1 of the Fourteenth Amendment to the Constitution of the United States provides in part as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Fifth Amendment to the Constitution of the United States provides in part as follows:

> ". . . Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Seventh Amendment to the Constitution of the United States provides in part as follows:

> ". . . the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law".

Statutes:

28 U.S.C. 1964 §1257 (3) provides in part as follows:

> "Final judgments or decrees rendered by the higher court or a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (3) By Writ of Certiorari, . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties, or statutes of, or Commission held or authority exercised under, the United States."

STATEMENT OF THE CASE

Separate complaints against each other were filed by Myra Grusin and Barbara Figler to recover for personal injuries sustained as the result of a collision hereinafter described. Both plaintiffs charged the other with negligence in the operation of their respective automobiles which collided with each other; the cases were consolidated. Both plaintiffs were seriously injured as a result of the collision. The jury rendered its verdict in favor of Myra Grusin. A judgment in the amount of $48,000.00 was entered against Barbara Figler. Barbara Figler's post-trial motions for judgment notwithstanding the verdict and for a new trial were denied. Barbara Figler appealed.

The collision in this case was caused by the driver of the southbound car. Each party testified that *she* was driving northbound. The southbound driver had gone to her left to pass a southbound Ford, driven by Ann Parker, and had hit the Ford, thereby losing control and jumping over the raised divider. In going in a southeasterly direction over the raised divider, the south-

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bound driver collided in the northbound lanes with the front end of the northbound car.

The collision took place at approximately 3:30 P.M. to 3:40 P.M. (R. 203) on October 2, 1961, in the northbound lanes of Lake Shore Drive (hereinafter referred to as the "Outer Drive") just north of the overpass of Fullerton Ave. in the City of Chicago, Illinois. (R. 75-412).

Barbara Figler was driving a 1960 White Valiant (R. 394-476) and Myra Grusin was driving a 1961 White Corvair (R. 216). The damage to Barbara's Valiant was to its left front side and the damage to Myra's Corvair was to its right front, which indicates the point of impact.

Barbara Figler on the day of the accident testified that she arrived at a Mr. Goldstein's office which was located in the loop at 428 South Wabash Avenue, Chicago, at about 1:00 P.M. (R. 398), after which Goldstein took her to lunch at a restaurant on Wabash Avenue, about a block away form his office (R. 401-402); that the luncheon took about an hour and a half (R. 402); that after the luncheon she returned to his office and telephoned a Mr. Roth to tell him she would be at his place of business to keep her appointment with him at 4:00 P.M. on the day of the collision (R. 403-406); that she left Goldstein's office shortly thereafter and went to a parking lot on Wabash Avenue for her car; that she then drove her car to the Outer Drive at Randolph Street, which at this time was between 3:15 P.M. and 3:30 P.M. (R. 408) and proceeded northbound on the Outer Drive to keep her 4:00 P.M. appointment with Roth whose offices are located on the north side of Chicago at 3855 Lincoln Avenue (R. 559).

Both Mr. Goldstein and Mr. Roth testified and corroborated the testimony of Barbara Figler (R. 559-561, 641-645).

As Barbara Figler was driving northbound on the Outer Drive at approximately 3:30-3:40 P.M. on the day of the collision at approximately Fullerton Avenue, she heard a loud scraping noise to her left (R. 412) and saw a car coming from the southbound lanes across her vision; she turned her steering wheel but the approaching car from the southeasterly direction crashed into her car (R. 413-415); and the right side of the southbound car hit the left side of her northbound Valiant (R. 415); and after the impact she had no further recollection of the events of the collision (R. 415-416).

After the collision, Barbara Figler's Valiant ended up facing northeast in the east parkway of the Outer Drive (R. 65) and Myra Grusin's Corvair ended up facing north in the northbound lane next to the raised divider.

Myra Grusin was teaching school on the day of the collision at the Bateman School which is located at 4214 North Richmond, Chicago, and which is 2900 West (R. 214); she finished teaching school at 3:15 P.M. on the day of the collision (R. 220-221); she was teaching first-grade that day and when the school bell rang at 3:15 P.M. she escorted the children downstairs with her two monitors (R. 321); she signed out in the principal's office and went to her car parked outside (R. 322-3); she got into her car with the intent of meeting her mother in the Chicago Loop (R. 221); after getting into her car she drove to Irving Park Boulevard (R. 324); and there are several stoplights on Irving Park when one goes east to the Outer Drive (R. 326-329). She testified it would take her from 8 to 10 minutes to get to the Outer Drive (R.

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331) (which would be approximately 3:30 P.M.); and that she entered the Outer Drive at Irving Park Blvd. which is 4000 North and was driving her car southbound in the Outer Drive on the way to the loop to meet her mother (R. 223). This then would place Myra Grusin as the driver of the southbound car at the time and place of the collision. However, she testified that she passed the place of the collision without incident and she suddenly remembered that her plans to meet her mother in the loop on that day had been changed. She testified she turned off the Outer Drive at the North Avenue Exit which is 1600 North and made a turnaround at a building at 1550 Lake Shore Drive and again entered the Outer Drive to return northbound and proceeded north on the Outer Drive and from that point of time lost all mental recall of the events of the day (R. 229-230).

Ann Parker testified that on the day of the occurrence she was driving southbound on the Outer Drive going to the loop (R. 34); that she was traveling between 40 and 45 miles per hour (R. 37); that as she was approaching the Fullerton Avenue Bridge the left rear of her car was bumped (R. 38); that after her car was bumped she slowed down slightly and she then turned her head to the left; that she saw a car about halfway across the northbound lanes traveling east; and that she saw this car from the time it was halfway across until it hit the bushes on the east side, where it came to a stop (R. 39). She then parked her car and walked back to the two cars involved in the collision and saw the two damaged cars (R. 49). She testified that she did not see the collision and that she did not know what car it was that bumped her car or which car it was that was following her car southbound (R. 49-50). Ann Parker further testified that she did not know of her own knowl-

edge whether it was the car which came to rest after the collision in the northbound lanes of the Outer Drive (the Corvair) that bumped her car or whether it was the car that was bounced into the bushes on the east side of the Outer Drive (the Valiant) that bumped her car (R. 51). She further testified that when she signed the police report on the day of the collision she had assumed that the car that she saw go into the bushes on the east side of the Outer Drive was the car that bumped her car (R. 50-51). She testified, however, that she did not know whether it was the Corvair or the Valiant that bumped her car and went over the divider (R. 50).

Officer Cummings testified that his observation of the occurrence before he ran to his squad car to call for help was for a period of two or three seconds (R. 112); that he saw the southbound car go over the divider and knowing that there was going to be a collision, he started toward his squad car to call for assistance (R. 145).

Officer Cummings further testified that from the time of the initial impact he did not know what happened nor did he see the movement of the two cars caused by the collision nor whether these cars were turned around as the result of the impact (R. 105) nor did he see the two cars come to rest (R. 105) for the reason that he started running to his squad car (R. 115).

REASONS FOR GRANTING THE WRIT

I.

Professor Donald Berry was called as a witness by Barbara Figler, plaintiff, to reconstruct the movements of the two cars involved in the collision before and after the collision in order to give his expert opinion as to

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which car was the southbound vehicle which caused the collision. An expert, Professor Berry, was to reconstruct said movements from the evidence in the record, photographs in evidence and the damage to the two automobiles involved in the collision. Barbara Figler was denied the right to have this evidence presented to the jury by the trial court on the grounds that there were eyewitnesses to the occurrence and the expert's testimony on this ground was inadmissible. The trial court based its ruling on the case of *Miller* v. *Pillsbury Co.*, 33 Ill. 2d 514, 211 NE 2d 733 (1965). However, as *Miller* points out, it is the trend today to permit expert testimony in matters which are complicated and beyond the knowledge or understanding of the average person and even as to matters of common knowledge and understanding where difficult of comprehension and explanation, as in the *Figler* case.

The trial court interpreted the *Miller* case as holding that expert testimony may be allowed only when there are no eyewitnesses qualified to testify. This interpretation was not warranted by the holding in the case. The admissibility of the opinion of the expert in automobile collision cases is not dependent on the lack of eyewitnesses. The test of admissibility as established in *Miller* is that where the facts for decision are complicated and outside the knowledge and understanding of the average person, and even as to matters of common knowledge and understanding where difficult of comprehension and explanation, the testimony of an expert is admissible. The trial court, in concluding that Ann Parker, Officer Cummings and Barbara Figler were eyewitnesses to the collision and that, therefore, the testimony of the expert was inadmissible, was in error on two counts. Firstly, Ann Parker testified that she did not see the collision

and could identify neither car as being the southbound car. Officer Cummings' observation of the collision was for two or three seconds and he testified that at and after impact he did not see the movement of the two cars resulting from the impact nor did he see the two cars come to rest after the impact. Barbara Figler testified that she was driving the northbound car but that after impact she had no further recollection of the collision.

Officer Cummings testified that Barbara Figler's Valiant was the southbound car and that the left front portion of the Valiant came in contact with the right front of the Corvair (R. 114). which is a physical impossibility. His testimony at the trial was contrary in this respect to his written police report and he attempts to explain the contradiction by testifying that he made a mistake in his police report. If the Valiant was the southbound car coming at the northbound car in a southeasterly direction, the point of contact would be the left front of the Corvair and according to the laws of nature and physics would have sent the Corvair into the bushes on the east side of the Outer Drive and would have spun the Valiant around, but such was not the case.

Expert testimony was obviously needed. The expert would have based his testimony upon the evidence in the case, which includes damage to the vehicles, as shown by testimony and photographs, where the two cars came to rest after the collision, the movement of the two cars at and before the impact. Such expert testimony would have assisted the jury in coming to its verdict as to which car was the southbound car causing the collision.

Secondly, while there were no eyewitnesses in this case who saw the complete occurrence, the trial court was in error in restricting the application of *Miller* to those cases

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where there are no eyewitnesses. *Miller* applies where the facts are complicated and outside the knowledge or understanding of the average person and where it is necessary to rely on knowledge and application of principles of physics, engineering and other sciences beyond the knowledge of the average person. This case fulfilled the guidelines established by *Miller* and the exclusion of the expert's testimony was reversible error.

The expert's qualifications were testified to in detail (R. 536-538) and his qualifications and competency were never questioned (R. 538-540).

To deprive a person of the introduction of competent, relevant and admissible evidence deprives that person of due process of law as guaranteed by the United States Constitution.

The Appellate Court further held in effect that the trial court properly excluded the testimony of the expert witness on the following grounds:

(a) That when the expert stated that his opinion would bear out the offer of proof made by counsel for appellant as long as the accident occurred immediately as the southbound vehicle crossed the median, he imposed a limitation that would make his opinion without probative value in this case;

(b) That from the evidence in this case "the expert would have been entitled to no different belief" than that of the testimony of appellant, Barbara Figler;

(c) That "traveling at 35 mph, Barbara Figler was traveling in excess of 50 feet per second";

(d) That the determination of the trial judge in admitting or rejecting such testimony requires him to exercise his sound discretion; and

(e) To be admissible, the opinion of the expert must be based on facts existing at the time of the accident and cannot be grounded on speculation or surmise.

No objection was raised in the trial court by Myra Grusin's counsel to the offer of proof on any of the grounds upon which the Appellate Court affirmed the trial court's exclusion of the expert's testimony. The only objection made which the trial court sustained, was as follows (R. 538-540):

> "Mr. Davidson: We have objected to it, Your Honor, in behalf of the plaintiff-defendant, Myra Grusin, on the grounds that there are three eyewitnesses to this occurrence, and while the testimony is in conflict the jury—the testimony of eyewitnesses they'll have to weigh and evaluate, and we think therefore this type of expert or opinion evidence is not admissible."

The trial court sustained counsel's objection on this ground and excluded the testimony of the expert (R. 540). The grounds upon which the Appellate Court affirmed the trial court in holding inadmissible the testimony of the expert, was not before the Appellate Court for its review and determination (*People* v. *Everist*, 52 Ill. App. 2d 73, 201 N.E. 2d 655 (1964); *Littlefield* v. *Alton and Southern Railroad*, 96 Ill. App. 2d 470, 239 N.E. 2d 147 (1968)).

Moreover, the plaintiff Barbara Figler was not put on notice in the trial court of the objections now relied on by the Appellate Court regarding the admissibility of the expert's opinion, was not given an opportunity to be heard in the trial court or to produce evidence to the trial court on such objections, and was thus deprived by the Appel-

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late Court of due process of law in violation of her constitutional rights under the Fourteenth Amendment of the United States Constitution, which provides that no person shall be deprived of life, liberty or property without due process of law (*Durkin* v. *Hey*, 376 Ill. 292, 300 (1941)).

Further, the trial court sustained the objection to the testimony of the expert on the ground that it believed that where there were eyewitnesses *Miller* v. *Pillsbury Company*, 33 Ill. 2d 514, 211 N.E. 2d 733 (1965) was not applicable. The trial court did not hold the expert's testimony inadmissible because of the expert's answer to the offer of proof and neither did the trial court exercise any discretion in excluding the testimony of the expert on any of the grounds upon which the Appellate Court affirmed, for the reason that the record establishes that no such objections were raised and were not before the trial court for its determination.

In fact the trial court indicated that he felt that if he had a discretion to act in this matter, he would have *allowed* the testimony of the expert to be submitted to the jury. In passing on Barbara Figler's post-trial motions he stated (R. 33):

> "I am so interpreting those cases, but rather as I stated very frankly, in the hope that perhaps I will be reversed and perhaps the Appellate Court will permit experts to be heard freely on this matter."

Thus, in view of the Appellate Court's statement that the trial court's "reason for rejecting the testimony of the reconstruction expert is error," it is obvious that if the trial court *had* exercised his discretion, he would have granted a new trial.

There is no evidence in the record for the Appellate Court's finding that "traveling at 35 mph, Barbara was traveling in excess of 50 feet per second". The offer of proof (R. 538-540) did not go beyond the evidence in this case and the opinion of the expert would have been based only on the evidence in the record and would be clearly admissible under *Miller*.

The evidence conclusively established that Myra Grusin was driving the southbound car at the time and place of the accident and that Barbara Figler was driving the northbound car at the time and place of the accident. The jury, in holding that Barbara Figler was driving the southbound car, came to a conclusion which was inherently improbable and the judgment of the trial court, and the opinion of the Supreme Court in affirming this conclusion, should be reversed by this Court.

II.

The Appellate Court of Illinois, First District, held that the trial court erred in rejecting the testimony of the expert on the ground of there being eyewitnesses to this case, but held that this was not an "error warranting a retrial as the opinion of the expert on the facts here shown would have been valueless." The weight and credibility to be given to the testimony is neither for a court of review nor for the trial court to rule upon. This comes within the exclusive province of the jury. The court's function is to pass upon admissibility of evidence and not upon the value or weight to be given admissible testimony. To deprive a person of the right to have the jury hear and consider all the evidence in arriving at its verdict deprives that person of due process of law as guaranteed by the Constitution of the United States and of that

person's right to a trial by jury as guaranteed by the Seventh Amendment to the United States Constitution. The credibility and weight to be given to the testimony comes within the exclusive province of the jury in the constitutional system of jurisprudence. To take such a matter away from the jury is to deprive the party to his right to have the matter tried by jury, a right guaranteed by the Constitution of the United States.

CONCLUSION

Petitioner prays that this Court grant this petition for certiorari, reverse the judgment of the Supreme Court of Illinois, and remand the case for a new trial.

Respectfully submitted,

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No. 1458

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BARBARA J. ABRAMSON,

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vs.

MYRA LEVINSON,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

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APPENDIX

52598

BARBARA J. ABRAMSON,
Plaintiff-Appellant,
vs.
MYRA LEVINSON,
Defendant-Appellee,
and
MYRA LEVINSON,
Plaintiff-Appellee,
vs.
BARBARA J. ABRAMSON,
Defendant-Appellant.

Appeal from
Circuit Court
Cook County
Honorable
JOHN C. FITZGERALD
Presiding

MR. JUSTICE SMITH Delivered The Opinion Of The Court:

One party here was southbound, the other north, but which one? It makes a lot of difference because the southbound car jumped the Lakeshore Drive divider and hit the other. Indeed, the trial court instructed the jury that the southbound car was guilty of negligence, the northbound car free from contributory negligence and the sole question for them to decide was which car was southbound. Each party sued the other charging negligence, the cases were consolidated for trial and a judgment entered on the jury's verdict in favor of Myra Levinson Grusin and against Barbara Abramson Figler for $48,000.00. Myra was driving a Corvair, and Barbara a Valiant. Barbara's post-trial motions for judgment n.o.v. and for a new trial were denied and she appeals, one of her points being that she was not southbound by Myra was.

In this court, she raises three issues: A. That the jury's verdict is against the manifest weight of the evidence because the physical damage to the cars indicates an in-

herent improbability that the Valiant was the southbound car, B. That the trial court erred in refusing to permit an expert offered on behalf of Barbara to reconstruct the accident, and C. That the court erred in permitting a doctor to express an opinion and give a reason for the loss of memory on the part of Myra Levinson Grusin. We will discuss these points in inverse order.

Objection is made to the testimony of the doctor that the injuries sustained by Myra Levinson Grusin were sufficient to account for her loss of memory for a minute or two prior to and during the accident in question. She remembered driving North on Outer Drive but had no recollection of the occurrence events and recalled only waking up in the hospital. The doctor recited his qualifications without objection and the objection to his opinion was only general. For the first time in this court, the testimony is objected to for the reason that the doctor had not studied or specialized in the field of lack of mental recall resulting from injuries due to automobile collisions and was thus incompetent to testify as an expert on this subject. Appellant cites no authority for her present assertion and it is fundamental that there is nothing for this court to review when the trial court was not asked to pass on the objection now made. The issue cannot be raised for the first time on the appellate level. People v. Everist, 52 Ill.App.2d 73, 201 N.E.2d 655; People v. Trefonas, 9 Ill.2d 92, 136 N.E.2d 817; O'Keefe v. Lithocolor Press, Inc., 49 Ill.App.2d 123, 199 N.E.2d 60.

Myra testified that she was proceeding north within the speed limit, but recalls nothing about the accident and is no help in that respect. Barbara testified she was proceeding north next to the divider, saw a flash of white in front of her, saw a woman driver across the passenger's seat of the other car, had time to apply the brakes with both feet, turn the wheel to the right and was stopped at the time of impact. However, she was not able to describe the route taken by her Valiant across the Outer Drive and into the bushes to the east. Her head went through the windshield and she was badly injured. The damage to Barbara's

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Valiant was on the left-front — the damage to Myra's Corvair was on the right-front. The Corvair skidded along the divider to the north for a distance of some 300 to 400 feet and caught fire.

Ann Parker testified that she was proceeding south on Outer Drive in the 3rd lane from the west and that a gray-colored car approached her from the rear, bumped her, went over the divider and over into the bushes on the east side of Outer Drive. It was her opinion that the car in the bushes was the one she saw in her rear-view mirror and was the one that struck her. She did not see the accident nor the actual contact between the two automobiles. A police officer was making an arrest, heard a thud, glanced up and saw a car going in a southeasterly direction and jump the divider. His original police report said that the car which jumped the divider hit the northbound car on the left side. He now changes his testimony in the trial of the case, but states unequivocally that it was the Valiant that jumped the divider and as a basis for such statement described the rear end of the Valiant and its lights in detail and as distinctive. He was subjected to a considerable cross-examination and asked to explain how the Valiant could have been struck on the left side and the damage to the Corvair on the right side of the Valiant had been the one crossing the divider. He explained it by saying that the southbound vehicle must have arced in the air and would have arced depending upon whether the front or the rear wheels crossed the divider last and explained the accident in this manner.

Barbara offered an expert to reconstruct the accident. An objection was made to the expert's testimony and sustained on the grounds that since there were eyewitnesses to the direction in which the cars were going, that the expert's evidence was inadmissible. The trial court took the position that Miller v. Pillsbury Company, 33 Ill.2d 514, 211 N.E.2d 733, and Ficht v. Niedert Motor Service, Inc., 34 Ill.App.2d 360, 181 N.E.2d 386, precluded reconstruction of an accident by an expert where there were eyewitnesses. In other areas the admissibility or inad-

missibility of testimony by an expert does not depend upon whether there were or were not eyewitnesses. The test of its admissibility or inadmissibility rests on a determination as to whether or not it is necessary to rely on knowledge and the application of principles of physics, engineering or other sciences which are beyond the normal ken of the average juror. Its admissibility is further limited by whether or not there is sufficient undisputed physical evidence to provide the basic data needed for the application of principles of physics, engineering or science. Absent such basic and essential facts, the opinion of any expert is as much speculation, guesswork and conjecture as would be a jury's verdict based on the absence of basic and necessary facts. Neither has any probative value. Schwartz v. Peoples Gas Light and Coke Co., 35 Ill.App.2d 25, 181 N.E.2d 826. Is a reconstruction expert in a different category?

The offer of proof states that the expert would testify that the location of the two vehicles after the accident plus the damage to the two vehicles as disclosed by the pictures makes the conclusion imperative and necessary that the Valiant was, prior to the accident, headed in a northerly direction and since no individual saw the progress of these vehicles after the original impact between the two cars, an expert's opinion is admissible on the ground that there were no eyewitnesses as to the course taken by the cars after impact. The court instructed the jury in this case that the driver of the northbound car was free from contributory negligence and the driver of the southbound car which crossed over the divider was negligent and that such negligence was the sole, proximate cause of the collision. He then stated: "Your verdict will be for that plaintiff who you find was the driver of the southbound automobile involved in the occurrence in question." Thus the offer of proof made by Barbara was to permit an expert to express an opinion which would ultimately and finally decide the lawsuit. In the context of this particular case, it was actually the only issue so far as liability was concerned. This, however, does not per se bar the opinion because the

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jury could still accept or reject that opinion as Miller v. Pillsbury suggests.

At the time the offer of proof was made, Barbara's counsel asked the professor whether his testimony would bear out the offer of proof which he had just made. The answer was: "It would bear out the offer of proof as long as the accident occurred immediately as the vehicle crossed the median." Barbara testified that she heard a scraping noise to her left and saw a white flash coming across. At that time she was traveling in the left-hand lane closest to the divider at about 35 mph. At the time she first saw it, it was in the southbound lane. She further testified that her first thought was to get away from it so "I turned my steering wheel to the right just ever so slightly and I applied my brakes — hard with both feet". She further testified that she saw a girl in the other car across the passenger window and that the right side of that car struck the left side of her car. At the time of impact, she testified she believed that her car was stopped and that half of it was in the third lane and half of it in the fourth lane. Traveling at 35 mph, Barbara was traveling in excess of 50 feet per second. Her description, therefore, of the occurrence events are simply unrealistic. Reaction time plus the time required to stop means that she had to travel some distance and considerably more than 50 feet from the time she first observed the car of Myra's and the impact. In this state of the record ,we think no error was committed in refusing to permit the testimony of the expert. It is apparent that the jury did not believe Barbara's testimony as to the occurrence events. It is equally clear that the opinion of the expert would have been entitled to no different belief based on those facts. The trial court held that the verdict was not against the manifest weight of the evidence and we concur.

His reason for rejecting the testimony of the reconstruction expert is error. It is not, however, an error warranting a retrial as the opinion of the expert on the facts here shown would have been valueless. Whether the testimony of a reconstruction expert and the expression of an opinion

in the reconstruction of the accident by the expert is admissible is a question to be first determined by the trial court. The determination of the trial judge in admitting or rejecting such testimony requires him to exercise his sound discretion in a particular case. Before it is exercised in favor of admissibility, there should be demonstrated to the trial judge the following factors:

1. The expert has the necessary expertise as a result of education, training and experience in the specific area about which he expresses an opinion,
2. The area of inquiry should require the employment of principles of physics, engineering or other science or scientific data beyond the ken of the average juror,
3. The opinion of the expert cannot be naked, but must come clothed in evidentiary facts in the record, the inferences reasonably arising therefrom and must be elicited by hypothetical questions containing substantially all of the undisputed facts in evidence relating to the issue about which an opinion is sought, and
4. There must be a need apparent from the record in the case for scientific knowledge, expertise and experience which will aid the jury to a correct and a just result.

The need for a reconstruction expert should be the exception rather than the rule in automobile accident cases. Even in the absence of eyewitnesses to the occurrence events, the physical evidence generally leaves a trail readily read by the average juror and no expert is needed. Where there are eyewitnesses, the reconstruction expert is even less warranted unless the testimony of the eyewitnesses is incredible, unbelievable or contrary to accepted, natural or scientific laws. There is no place for the opinion of a reconstruction expert if the determinative facts are otherwise established by credible, physical or eyewitness evidence. A demonstrable need for expert testimony, with the limitations herein stated, is the key to the exercise of a sound discretion by the trial court. Thomas v. Cagwin, 43 Ill.App.2d 336, 193 N.E.2d 233; Buckler v. Sinclair Re-

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fining Co., 68 Ill.App.2d 283, 216 N.E.2d 14. The opinion, if needed, must be based on facts existing at the time of the accident and absent such facts, the opinion is worthless and it's reversible error to admit it. Jines v. Greyhound Corp., 33 Ill.2d 83, 210 N.E.2d 562. To be admissible, the opinion must be grounded in something more than mere conjecture, speculation or personal surmise. Schwartz v. Peoples Gas Light and Coke Co., 35 Ill.App.2d 25, 181 N.E.2d 826; Year Investments, Inc. v. Joyce, 62 Ill.App.2d 173, 210 N.E.2d 66; Deaver v. Hickox, 81 Ill.App.2d 79, 224 N.E.2d 468. Applying these principles to the offer of proof here made and to the expert's own limitation upon his opinion, we necessarily conclude that that opinion would be without probative value on this record. Accordingly, there was no error in excluding it.

The judgment of the trial court in the trial of these consolidated lawsuits is affirmed.

Affirmed.

Trapp, P.J. and Craven, J. concur.

APPELLATE COURT

First Judicial District
Of Illinois

LESLIE V. BECK, Clerk
Chicago

BARBARA J. ABRAMSON,
Plaintiff-Appellant

vs.

MYRA LEVINSON,
Defendant-Appellee

MYRA LEVINSON,
Plaintiff-Appellee

vs.

BARBARA J. ABRAMSON,
Defendant-Appellant

Appeal from
Circuit Court
Cook County

Gen No. 52598

The Court having considered the Petition for Rehearing filed by appellant in the above entitled cause, and the answer to petition for rehearing filed by the appellee, and being now sufficiently advised of and concerning the premises, it is ordered that said Petition be denied.

SAMUEL SMITH
HAROLD E. TRAPP
JAMES C. CRAVEN
Judges

No. 52598

APPELLATE COURT

First Judicial District of Illinois

BARBARA J. ABRAMSON,
Plaintiff-Appellee

vs.

MYRA LEVINSON,
Defendant-Appellant

MYRA LEVINSON,
Plaintiff-Appellee

vs.

BARBARA J. ABRAMSON
Defendant-Appellant

} Appeal From Circuit Court Cook County

ORDER DENYING CERTIFICATE OF IMPORTANCE

And now this matter coming on to be heard upon the petition of the plaintiff-appellant for a Certificate of Importance to the Illinois Supreme Court in accordance with the provisions of Rule 316 and the Court having considered said petition and the answer thereto filed by the defendant-appellee and the court now being fully advised in the premises, it is ordered that said Certificate of Importance should be and the same is hereby denied.

Dated this 25th day of July, 1969.

SAMUEL SMITH
HAROLD E. TRAPP
JAMES C. CRAVEN
Judges

UNITED STATES OF AMERICA

State of Illinois }
Supreme Court } ss.

At a Term of the Supreme Court, *begun and held in Springfield, on Monday, the tenth day of November in the year of our Lord, one thousand nine hundred and sixty-nine, within and for the State of Illinois*

Present: ROBERT C. UNDERWOOD, *Chief Justice*
Justice WALTER V. SCHAEFER
Justice DANIEL P. WARD
Justice CASWELL J. CREBS
Justice THOMAS E. KLUCZYNSKI
Justice JOHN T. CULBERTSON, JR.
Justice MARVIN F. BURT

WILLIAM J. SCOTT, *Attorney General*
ROBERT G. MILEY, *Marshal*
Attest: JUSTIN TAFT, *Clerk*

Be It Remembered, *that, to-wit: on the 24th day of November, 1969, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said court, had and entered of record, to-wit:*

BARBARA J. ABRAMSON,
Petitioner
No. 42518 vs.
MYRA LEVINSON,
Respondent

Petition for Leave to Appeal from Appellate Court
First District 52598

And now on this day the Court having duly considered the Petition for Leave to Appeal herein and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies Leave to Appeal herein.

And it is further considered by the Court that the said Respondent recover of and from the said Petitioner costs by her in this behalf expended, to be taxed, and that she have execution therefor.

I, JUSTIN TAFT, *Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.*

In Witness Whereof, *I have hereunto subscribed my name and affixed the Seal of said court this 27th day of April, 1970.*

/s/ JUSTIN TAFT
Supreme Court of the State of Illinois.